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No. 1036

In the Supreme Court of the United States

OCTOBER TERM, 1946

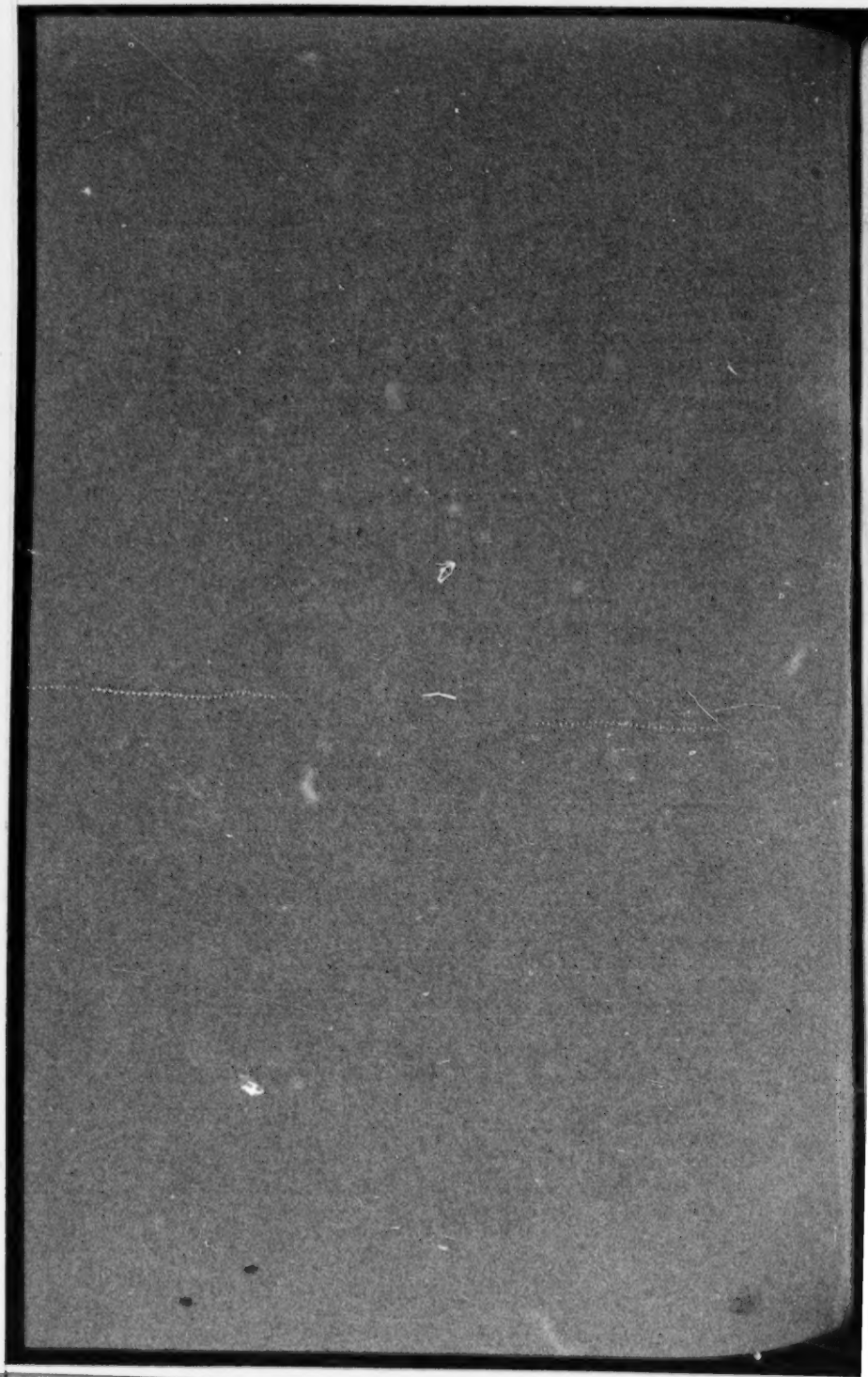
CHARLES L. SMITH, PETITIONER

v.

PHILIP B. FLEMMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT



INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulation involved	3
Statement	3
Argument	6
Conclusion	11
Appendix	13

CITATIONS

Cases:

Brown v. *United States*, 276 U. S. 134	8, 10
Case, J. I., Co. v. *National Labor Relations Board*, 321 U. S. 332	11
Cudmore v. *Bowles*, 145 F. 2d 697, certiorari denied, 324 U. S. 841	7
Fleming v. *Mohawk Wrecking & Lumber Co.*, 156 F. 2d 891, certiorari granted, No. 583, October Term, 1946	6, 7, 11
Goodyear Tire & Rubber Co. v. *National Labor Relations Board*, 122 F. 2d 450	8
Hagen v. *Porter*, 156 F. 2d 362, certiorari denied, No. 331, October Term, 1946	7, 10
Hale v. *Henkel*, 201 U. S. 43	9
New York & Maryland Line R. R. Co. v. *Winans*, 17 How. 30	7
Oklahoma Press Publishing Co. v. *Walling*, 327 U. S. 186	8, 10
Perkins v. *Endicott Johnson Corp.*, 128 F. 2d 208, affirmed, 317 U. S. 501	9
Raley v. *Fleming*, 156 F. 2d 561, certiorari granted, No. 512, October Term, 1946	6, 7, 10, 11
Shotkin v. *Nelson*, 146 F. 2d 402	11
United States v. *Cream Products Distributing Co.*, 156 F. 2d 732	11
Wheeler v. *United States*, 226 U. S. 478	10

Statute and Regulations:

Emergency Price Control Act of 1942 (56 Stat. 23, as amended, 58 Stat. 632, 50 U. S. C. App., Supp. V, Sec. 901 et seq):	
Section 202 (a)	13
Section 202 (b)	13
Section 202 (c)	13
Section 202 (d)	14

Statute and Regulations—Continued.
Emergency Price Control Act of 1942, etc.—Continued.

	Page
Section 202 (c)	14
MPR 209 (7 F. R. 6788)	4
MPR 265 (7 F. R. 9229)	4
MPR 311 (8 F. R. 1269)	4
MPR 448 (8 F. R. 11435)	4
MPR 537 (9 F. R. 5924)	4
MPR 587 (10 F. R. 5905)	4
Revised General Order 53 (9 F. R. 5191)	6, 14
Miscellaneous:	
Federal Rules of Civil Procedure,	
Rule 52 (a)	8
Rule 81 (a) (3)	9

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OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 32–37) is reported at 158 F. 2d 372.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 25, 1946 (R. 37–38). A petition for rehearing was denied on December 30, 1946 (R. 38). The petition for a writ of certiorari was filed on February 17, 1947. Jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347 (a)).

QUESTIONS PRESENTED

1. Whether the Emergency Price Control Act of 1942 authorizes the delegation by the Price Administrator to District Directors of the authority to sign and issue subpoenas.

2. Whether Revised General Order No. 53 of the Office of Price Administration authorizes a District Director to issue such subpoenas signed by himself in his own name.

3. (a) Whether a subpoena which requires production of records before named individuals without specifying their governmental authority is valid.

(b) If not, whether an order of a district court which requires production of records before duly authorized employees of the Office of Price Administration is nevertheless improper because the original subpoena, as issued by the District Director, required production before named individuals without specifying their governmental authority.

4. Where an administrative subpoena does not in itself state the subject of inquiry or the materiality to that inquiry of the records sought but where such subject and materiality are apparent on the face of subpoena and the petition for its enforcement, whether a district court may enforce the subpoena without holding hearings as to those

issues and without entering findings of fact and conclusions of law.

5. (a) Whether a subpoena requiring all of the records of an individual is unreasonably broad, where it is clear from the face of the subpoena that it is addressed to the individual only with respect to a single business enterprise of his.

(b) If so, whether an order of a district court which expressly limited the records required to be produced to specified items, and only to such as pertained to a single business enterprise, is nevertheless improper because the original subpoena, as issued by the Price Administrator, was not expressly so limited.

6. Whether service of process of a petition for enforcement of a subpoena is essential where the opposing party has voluntarily come into court, moved to dismiss the petition, on substantive as well as procedural grounds, and submitted an affidavit in opposition to the petition.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App., Supp. V, 901 et seq.) and Revised General Order 53 (9 F. R. 5191) are set forth in the Appendix, pp. 13–15.

STATEMENT

Petitioner is the sole owner of the Dungeness Company, which was engaged in the sale of canned

seafood while such products were subject to price controls.[1] On June 17, 1946, a subpoena, signed by the District Director of the Seattle District Office of the Office of Price Administration, was served on the petitioner (R. 6–8). This subpoena, addressed to "Charles L. Smith, doing business as Dungeness Company, 855 Dexter Horton Building, Seattle, Washington," ordered Smith to appear and produce for inspection and copying at his office by Ralph Owen and E. V. Patterson "all of the financial, accounting, cost and other records, including but not limited to the following:" after which followed a list of ten items, including articles of partnership, bank statements, cancelled checks, copies of income tax returns, ledgers, inventories, sales invoices, vouchers, contracts and general correspondence files (R. 6–7). The petitioner refused to produce the records (R. 4–5). On June 21, 1946, the Price Administrator filed a petition with the district court, praying for an order to require Smith to comply with the subpoena (R. 2–9). The petition set forth that the Price Administrator deemed that an investigation was necessary to assist in the administration and enforcement of the Act and regulations, and to

[1] Canned seafood was covered by a number of maximum price regulations, each of which contained record-keeping requirements. See, e. g., MPR 209 (7 F. R. 6788) (Sardines); MPR 265 (7 F. R. 9229) (Canned salmon); MPR 311 (8 F. R. 1269) (Canned shrimp); MPR 448 (8 F. R. 11435) (Canned clams); MPR 537 (9 F. R. 5924) (Canned fish flakes); MPR 587 (10 F. R. 5905) (Miscellaneous canned fish and seafood).

ascertain whether the Dungeness Company had complied therewith, and that in conducting this investigation, it was deemed necessary to obtain information from that company's records (R. 4). The petitioner voluntarily came into the district court on June 24, 1946, and made three motions to dismiss the petition: (1) Appearing specially, he asserted that the petition was insufficient on its face and invalid; (2) Also appearing specially, he asserted that he had not been served with process; (3) Without waiving the prior motions, he asserted that the court lacked jurisdiction of the subject matter and that the petition failed to state a claim upon which relief could be granted (R. 9–11). On the same day, he also submitted an affidavit, asserting that he was the sole owner of the Dungeness Company; that he had sole custody of its records; that he had been handed a subpoena which did not purport to be signed by or on behalf of Paul A. Porter, the then Price Administrator; that his refusal to honor this purported supoena was not contumacious but because he believed it to be invalid; and that to require production of his books and records would be to violate his constitutional right against self-incrimination (R. 12–13).

On August 5 and 7, 1946, the district court entered orders requiring the petitioner to produce records, and denying the petitioner's three motions (R. 15–19). The order requiring production of the documents differed from the subpoena in three

principal respects: (1) The records were to be made available to Paul A. Porter and his duly authorized employees; (2) the documents required were specifically delimited to those pertaining to the business of the Dungeness Company; and (3) the clause requiring production of "all of the financial, accounting, cost and other records, including but not limited to the following:" was eliminated and only the records specifically enumerated in the subpoena were required (R. 15–16). On November 25, 1946, these orders were affirmed by the Circuit Court of Appeals for the Ninth Circuit (R. 32–38), and on December 23, 1946, a petition for rehearing was denied (R. 38).

ARGUMENT

1. There are now pending before this Court *Raley* v. *Fleming* and *Fleming* v. *Mohawk Wrecking & Lumber Co.,* Nos. 512 and 583, in which the power of the Price Administrator to delegate to District Directors the authority to sign and issue subpoenas is at issue. The Court may prefer to defer action on this petition pending disposition of those cases.

2. The delegation of authority set forth in Revised General Order No. 53 (Appendix, pp. 14–15), is not limited to the issuance by the delegate of a subpoena signed by him in the Price Administrator's name, as distinguished from one signed by the delegate in his own name, as was done here. The Order does not specify that one or the other

form must be used. In the *Raley* and *Mohawk* cases, *supra,* the subpoenas were signed in the District Director's name, and it was assumed that the requirements of the regulation had been met.

3. The subpoena was not rendered invalid by its requirement that records be produced before named individuals without specifying their governmental authority. The petitioner did not question in the district court the status of the individuals named, and the district court could probably have taken judicial notice of the identity of government employees had the issue been raised. Cf. *New York & Maryland Line R. R. Co.* v. *Winans,* 17 How. 30. Moreover, as pointed out by the court below, if the petitioner had any doubts, he "could readily have asked for their credentials" (R. 36). In any event, the order of the district court required that the petitioner make the records available "to Paul A. Porter, Administrator of the Office of Price Administration, and his duly authorized employees," and the issue before the circuit court of apeals was not the propriety of the subpoena as originally drafted, but the validity of the order of the district court from which the appeal had been taken. See *Cudmore* v. *Bowles,* 145 F. 2d 697 (App. D. C.), certiorari denied, 324 U. S. 841; *Hagen* v. *Porter,* 156 F. 2d 362 (C. C. A. 9th), certiorari denied, No. 331, October Term, 1946.

735230—47——2

4. The purpose of the inquiry and the materiality thereto of the records sought were sufficiently shown on the face of the petition for enforcement of the subpoena to warrant the district court in ordering production of the records. In the petition for enforcement of the subpoena, it was expressly stated that an investigation was deemed necessary to assist in the administration and enforcement of the Act and regulations and to ascertain whether the Dungeness Company had complied therewith (R. 4). It was likewise alleged and not denied that the documents sought to be produced were relevant and material to the investigation (R. 5); and no attack on the materiality of any particular document has been made by the petitioner at any stage of these proceedings. No further showing of materiality by the Administrator was necessary. *Brown* v. *United States,* 276 U. S. 134, 143; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186.

Nor is there any merit to petitioner's contention that the district court should have held hearings and issued findings of fact and conclusions of law, such as those required by Rule 52 (a) of the Federal Rules of Civil Procedure. Such steps need not be taken in the relatively summary proceedings involved in the enforcement of an administrative subpoena. Petitioner cites no case in conflict with the rule in *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board,* 122 F. 2d 450 (C. C. A. 6th), that these requirements are in-

applicable to the enforcement of administrative subpoenas.[2]

5. The subpoena, either as issued by the Administrator or as enforced by the court, was not unreasonably broad in its demands. The subpoena was limited to records of the petitioner pertaining to his Dungeness Company business, since it was addressed to him not in his personal capacity, but to "Charles L. Smith, doing business as Dungeness Company" (R. 6). The subpoena called for "all of the financial, accounting, cost and other records * * * ." "Other records" would be subject to the normal interpretation pursuant to the rule of *eiusdem generis,* and would mean merely other records of the same general type, i. e., prices paid and received, expenditures and income, and the like. And since the records were to be produced for inspection and copying at the petitioner's offices, there can be no contention, such as there was in *Hale* v. *Henkel,* 201 U. S. 43, upon which the petitioner relies, that removal of his records would bring

[2] Nor does conflict exist, in the cases cited by petitioner, as to applicability of any other particular part of the Rules; though some courts have applied some of the Rules and other courts have refused to apply others. As observed in *Perkins* v. *Endicott Johnson Corp.*, 128 F. 2d 208, 226–7 (C. C. A. 2), affirmed, 317 U. S. 501, the Rules could properly be followed for appellate procedure, yet be inapplicable to pre-appellate procedure.

It is further to be noted that since the applicability henceforth of the Federal Rules to proceedings of this nature has been clarified by the amended Rule 81 (a) (3), there is no need to decide their applicability in the instant case.

petitioner's business to a standstill. Cf. *Raley* v. *Porter,* 156 F. 2d 561 (App. D. C.), certiorari granted, No. 512, October Term, 1946. (Certiorari was denied as to this issue, being limited to the delegation question.)

In any event, the order of the district court specifically limited the records required to those pertaining to the business of the Dungeness Company, and eliminated the clause ordering "all of the financial, accounting, cost and other records * * *," confining itself to ten enumerated classes of documents (R. 15–16). No objection was addressed by the petitioner to any of the classes of records listed, on the ground of vagueness or breadth. And, in fact, subpoenas at least as broad have been sustained by this Court. Cf. *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186; *Brown* v. *United States,* 276 U. S. 134; *Wheeler* v. *United States,* 226 U. S. 478. Thus, even if the subpoenas, as drawn by the Administrator, were invalidly broad or uncertain, the district court properly, in the exercise of its discretion, modified them to render them valid, and then enforced them as modified. There is no reason why the district court should have been compelled to accept or reject them in their entirety (*Hagen* v. *Porter,* 156 F. 2d 362 (C. C. A. 9th), certiorari denied No. 331, October Term, 1946) any more than a court enforcing an order

of an administrative body is denied discretion, where it finds the order partially illegal, to enforce it insofar as it is valid. Cf., e. g., *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332.

6. The voluntary appearance of the petitioner in court and his contest of the propriety of the subpoena on the merits, cured any defect in the lack of service and obviated the necessity of subsequent service. Petitioner appeared in court to move to dismiss the petition for enforcement for various reasons (including a substantive attack on the petition on the grounds that the court lacked jurisdiction over the subject matter and that the petition failed to state a claim upon which relief could be granted), and likewise filed an affidavit in support of his position (R. 9–13). As pointed out by the court below, "process would presumably have been issued and served in due course had not appellant's voluntary appearance rendered that procedure unnecessary." (R. 35). Cf. *Shotkin* v. *Nelson,* 146 F. 2d 402, 405 (C. C. A. 10th); *United States* v. *Cream Products Distributing Co.,* 156 F. 2d 732, 734 (C. C. A. 7th).

CONCLUSION

Since this case involves a question as to the authority of the Price Administration to delegate his subpoena powers, the Court may desire to postpone action on the petition pending disposition of the *Raley* and *Mohawk* cases, Nos. 512 and

583, now awaiting argument and decision on the merits. In all other respects, certiorari should be denied.

Respectfully submitted.

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MARCH 1947.

APPENDIX

1. Pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 50 U. S. C. App., Supp. V, Secs. 901 et seq.).

SEC. 202 (a). The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act, and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any

other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order rquiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

2. Provisions of Revised General Order 53 (9 F. R. 5191, May 13, 1944):

General Order 53 is amended and revised to read as follows:

Pursuant to the authority conferred upon the Administrator by the Emergency Price Control Act of 1942 as amended, the following order is prescribed:

(a) *Order delegating authority to sign and issue subpoenas and inspection requirements in rent and price investigations.*—In connection with any investigation related to the administration or enforcement of the Emergency Price Control Act of 1942 as amended, or any regulation or order issued thereunder, the several Regional Administrators and the several District Directors of the Office of Price Administration are each authorized within their respective regions, or districts to sign and issue: (1) subpoenas requiring any person to appear and testify or to appear and produce documents, or both, at any designated place; (2) inspection requirements requiring any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodation, to permit the inspection and copying of records and any other documents and to permit the inspection of inventories or defense-rental area housing accommodations, or both.

(b) The terms used herein shall have the same meaning as in the Emergency Price Control Act.

Issued and effective this 13th day of May 1944.

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